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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. FRANKLIN DELANO WARE, Defendant and Appellant.	B159623 (Los Angeles County Super. Ct. No. TA 063001)

APPEAL from a judgment of the Superior Court of Los Angeles County. Gary E. Daigh, Judge. Affirmed as modified.

Cynthia L. Barnes for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Marc J. Nolan, Supervising Deputy Attorney General, and Jeffrey A. Hoskinson, Deputy Attorney General, for Plaintiff and Respondent.

Defendant Franklin Delano Ware timely appealed from his conviction on one count each of rape, assault with a semiautomatic firearm, kidnapping, criminal threats, first degree burglary, first degree robbery and possession of a firearm by a felon. The jury found all of the associated special allegations to be true. The jury acquitted appellant of count VI (burglary) and deadlocked as to the verdict on count I (rape).[1] The court found four prior conviction allegations to be true and sentenced appellant to a total of 160 years to life. Appellant raises several issues pertinent to his conviction. We affirm as modified.

FACTUAL BACKGROUND

I. Prosecution Case

Before August 2001, appellant lived with Cynthia and her two young sons. Cynthia's relationship with appellant ended towards the end of July 2001, when she went with appellant to check him into a drug rehabilitation program. While in the program, appellant continued to call Cynthia even though he was not supposed to call.

On August 2, appellant decided to leave the program because he could not deal with the program and he wanted to be with Cynthia. At first, Cynthia urged appellant to remain in the program, but ultimately she agreed to pick him up. Though Cynthia was initially to drop appellant off at a friend's house, he convinced her to allow him to stay in a field next to her house, promising he would not "fool with" her.

That night, appellant went to Cynthia's house twice, once for a blanket and once for food. The third time, appellant asked to stay on the floor next to Cynthia's bed. Though Cynthia refused at first, she permitted appellant to do so, though she rejected his request for sex. Per their agreement, appellant left the next morning before Cynthia awakened her children.

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[1] The court declared a mistrial on count I and subsequently dismissed that count.

That morning, Cynthia locked the door to her house and took her children to school. After Cynthia dropped her boys off at school, she picked up appellant's paycheck, deposited the check and withdrew $40,[2] and got breakfast and lunch for work before returning home. When Cynthia returned home, she found appellant inside her house sitting on the love seat. Appellant apologized for breaking the kitchen window to get inside and promised to fix it. Cynthia told appellant not to worry about it and explained she had to get ready for work. Cynthia then went into her bedroom to get dressed. Appellant followed her into the bedroom and, according to Cynthia, raped her.[3]

Next, appellant had Cynthia drive him to the hardware store so that he could fix the window; when they returned, Cynthia told appellant she had to leave for work. Instead, Cynthia drove to the sheriff's station and reported the alleged rape. Two deputy sheriffs went to Cynthia's home and took appellant into custody.

After spending several nights in a hotel, Cynthia and her boys returned home. Upon returning, Cynthia began sleeping with a loaded nine-millimeter handgun underneath her pillow. Cynthia had obtained the gun when she was employed as a security guard. Appellant remained in custody until August 7; after he was released, he checked into the Royal Palms Recovery Center, where he remained from August 9 to 14.

In the early morning darkness of August 15, Cynthia awoke to find appellant standing over her with a kitchen knife to her throat. Appellant told Cynthia that if she screamed, he would cut her throat and kill her children, who were sleeping in another room. Appellant asked Cynthia where she kept her gun. Cynthia lied and told appellant it was in her car. Appellant led Cynthia at knifepoint to her car, where she searched the trunk for several minutes. When Cynthia failed to find the gun, appellant ordered her back into the house.

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[2] Appellant had given Cynthia authorization and access to his employment checks and bank accounts.

[3] The jury deadlocked on the count I charging this rape.

Back in the bedroom, appellant pushed Cynthia onto the bed, causing the gun to slide out from under the pillow. Appellant exchanged his knife for the gun and placed the knife on a dresser near the bed. Appellant then held the gun to Cynthia's head and told her not to say anything and claimed he would kill both Cynthia and himself if he could not have her. Appellant then ordered Cynthia to take off her clothes and lay on the floor, so they could "make love like [they] use to." Cynthia objected, but complied, asking appellant "why [he was] doing [this]." Appellant responded, "if he couldn't have [her], ain't nobody gonna have [her]." Appellant then pulled down his pants, laid on top of Cynthia, and, without a condom, inserted his penis into her vagina until he ejaculated. The entire time, appellant pointed the gun at Cynthia's temple.

When appellant finished, Cynthia put her pajamas back on, after which appellant asked for some money and told her that she was coming with him. Cynthia initially denied having any money, but eventually led appellant to $23 on her living room table. Appellant then forced Cynthia to come with him, over her objections, after she wrote a note for her children explaining she would be back later.

Appellant had Cynthia drive him to four or five drug houses looking for cocaine, stopping at one point to pick up a friend, who got into the backseat of the car. The three then went to an abandoned house, where appellant smoked cocaine and forced Cynthia to do the same, despite her objections and attempts to pretend to smoke it. Cynthia tried to escape once, but appellant ordered her back. When the friend asked why appellant made her stay, appellant pointed the gun at him and told him to "'mind his business.'"

When appellant and Cynthia left the abandoned house, appellant asked her for more money. When Cynthia told appellant that all she had were food stamps, he told her to drive him to Los Angeles. On the way, appellant got thirsty and had Cynthia stop at J & E Liquors, where he gave her a dollar and told her to buy him a soda. Appellant ordered Cynthia not to say anything to anyone. In the store, Cynthia picked up a soda and, when paying for it, asked the cashier, Therese Scott, to call the police because she had been kidnapped. Cynthia wrote the license plate number of her car on a receipt for

Scott. As Cynthia was writing the number down, appellant ran into the store with the gun accusing Cynthia of talking to someone and yelling at her to hurry up. Cynthia denied talking to anyone and explained she was short a quarter. Appellant threw a dollar on the counter and pulled Cynthia out of the store.

Appellant initially had Cynthia drive away, but had her return shortly thereafter to make sure the police had not arrived. Appellant then had Cynthia drive to two separate motels on Figueroa. At the second motel, appellant asked a man standing out front whether he would accept a gun in exchange for cocaine. The man walked into an apartment, and, as appellant started to follow him, Cynthia tried to escape. Appellant saw her and ordered her to return. As appellant continued to bargain with the man, Cynthia mouthed for the man to take the gun. The man did, throwing the gun into a burgundy car. Cynthia immediately ran out of the motel and down Figueroa, toward a police car she had seen about a block away.

Cynthia explained to Officer Andre Wright what had happened. Wright saw appellant run across Figueroa and called for units to set up a perimeter. Appellant was arrested.

A cocaine pipe was found on appellant. A nine-millimeter handgun was recovered wrapped in a jacket from the passenger floorboard area of a burgundy Oldsmobile parked three feet from Cynthia's car. During the subsequent search of Cynthia's house, a knife was found on the dresser next to her bed. No fingerprints were recovered from the gun or the knife. Deputies conducting the search noticed that one of the kitchen windows was missing. When Cynthia returned home from the hospital, she found a black jacket and a key to appellant's room at the Royal Palm Recovery Center outside her kitchen window. Cynthia recognized the jacket as one she had given to appellant.

Susan Gorba, a registered nurse and sexual assault specialist, interviewed and examined Cynthia. According to Gorba, Cynthia provided a tearful recounting of her ordeal. A vaginal examination revealed abnormalities, but Cynthia's injuries were not

conclusive of rape. Gorba stated the injuries of a woman raped at knifepoint or gunpoint are generally less severe due to the victim's compliance.

II. Defense Case

Cynthia made inconsistent reports and statements regarding the two incidents. Cynthia first told the deputies appellant used a firearm during the August 3rd incident. Cynthia said appellant did not put the gun down until they returned from the hardware store. Cynthia also said appellant forced her to have sex with him after they came back from the hardware store and then she made an excuse to leave the house while appellant remained there. Later, Cynthia denied telling the reporting deputies that appellant had a gun on August 3rd.

The initial reports taken from Cynthia regarding the August 15th incident did not include a statement appellant had made her smoke cocaine during the kidnapping. The officers investigating the crime scene on August 15 never saw a black jacket and keys in the backyard even though Cynthia claimed to have located them four feet from her kitchen window.

After appellant's release from custody on the August 3rd incident, he complained to the police that Cynthia had taken money out of his bank account without his permission.

DISCUSSION

I. Retaliatory Prosecution

A. Background

According to appellant's motion to dismiss for retaliatory prosecution:

"This case was originally filed as . . . LASC Case No. TA 061447. On November 30, 2001 defense attorney Patsy Myers met with District Attorney John McKinney and Detective Serna in the district attorney's office to discuss possible settlement. The defendant was a medical missout during [that] period due to a broken wired jaw. At that time the defense was advised of the prosecution's offer and intent to file 4 out-of-state 'strike' priors and add a count, of violation of Penal Code 12021(a)(1), ex-felon with a gun if the offer of 21 years was not accepted. The offer was not accepted.

"The 60th day for Trial was December 17, 2002. On December 17, 2002, in the master calendar court . . . the prosecution filed an amended information in Case No. TA 0611447 [sic] alleging 4 out of state 'strike' priors, and a count of violation of Penal Code section[4] 12021(a)(1), ex-felon with a gun. The original discovery turned over to the defense under Case No. TA 061447, disclosed . . . the potential existence of the above added counts.

"The defense filed a 995 motion to dismiss the added count 9, violation of Penal Code Section 12021(a)(1) . . . on the grounds that no proof of this charge had [been] submitted by the prosecution. The prosecution did not challenge the motion, but rather announced unable to proceed and the court dismissed the information as requested by the prosecution over the objection of Defendant . . . .

"A hold was placed on defendant, and the case was refiled under Case No. TA 063001 adding Count 9 and the 4 out-of-state priors."

The trial court found that based on the evidence presented, the out-of-state priors came to light after the original information was filed. The court denied the motion, finding the refiling was not retaliatory.

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[4] All statutory references are to the Penal Code.

B. The Issue

Appellant contends the court's denial of his motion to dismiss for retaliatory prosecution violated his federal and state due process rights as the circumstances presented raised a reasonable likelihood of vindictiveness.

In *People v. Michaels* (2002) 28 Cal.4th 486, after the prosecution amended the complaint to charge special circumstances, defendant moved to strike the special circumstances on the basis the amendment was a vindictive response to his attempt to exercise his right to plead guilty. The court discussed vindictive prosecution.

"There is no doubt that the timing of the amendment was occasioned by the defendant's attempt to plead guilty to the charge of murder. But there is nothing in the record to show the amendment was a vindictive response. The prosecution had already made clear, before defendant's plea, that it was considering special circumstance allegations. There is nothing suspicious in its failure to file them with the initial charges. '"'[A] prosecutor should remain free before trial to exercise the broad discretion entrusted to him to determine the extent of the societal interest in prosecution. An initial decision should not freeze future conduct [because] the initial charges filed by a prosecutor may not reflect the extent to which an individual is legitimately subject to prosecution.'"'

"Here, defendant was not yet in jeopardy. The United States Supreme Court has refused to apply a presumption of vindictiveness in a pretrial setting. In [*People v. Edwards* (1991) 54 Cal.3d 787, 828], we noted that the attachment of jeopardy was an 'important factor' in determining vindictiveness, and although *Edwards* did not absolutely prohibit a court from presuming vindictiveness in a pretrial setting, neither *Edwards* nor any other California case has done so. The circumstances here do not present a 'reasonable likelihood of vindictiveness' that would shift the burden of proof to the prosecution to show that the amendment 'was justified by some objective change in circumstances or in the state of the evidence.'

"Because vindictiveness is not presumed, the defense must present evidence showing that the '"prosecutor's charging decision was motivated by a desire to punish [the defendant] for doing something the law plainly allows him to do."' Defendant here failed to present such evidence." (Citations omitted.) (*People v. Michaels*, *supra*, 28 Cal.4th at pp. 514-515.)

Similarly, we are not convinced the circumstance here justify a presumption of vindictiveness. Unlike the other cases cited by appellant in which jeopardy had already attached, even though the new charges were added on the 60th day, jeopardy had not yet attached. Moreover, the prosecutor had indicated an intent to add the new counts prior to appellant's section 995 motion to dismiss, and defense counsel was aware the charges would be added if the prosecution's offer of 21 years was not accepted.

II. Substantial Evidence

Appellant contends the evidence was not sufficient to support the judgment. "In reviewing the sufficiency of evidence on appeal, the court must review the 'entire record in the light most favorable to the judgment to determine whether it contains substantial evidence -- that is, evidence which is reasonable, credible, and of solid value -- that would support a rational trier of fact in finding the [defendant guilty] beyond a reasonable doubt.'" (*People v. Michaels*, *supra*, 28 Cal.4th 486, 515.)

Appellant's specific complaint is that Cynthia's testimony was so inconsistent in the important particulars from the statements she gave to the officers on the day of the incidents and with the statements she later gave the police (as set forth above in the factual background), that her testimony cannot be said to be of solid value or to reasonably inspire confidence. Appellant is attempting to have this court reweigh the evidence. First, most of the inconsistencies relate to the circumstances of the alleged rape of August 3, the count on which the jury deadlocked.

Second, """Although an appellate court will not uphold a judgment or verdict based upon evidence inherently improbable, testimony which merely discloses unusual circumstances does not come within that category. To warrant the rejection of the statements given by a witness who has been believed by the [trier of fact], there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions. Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends."" (Citations omitted.) (*People v. Barnes* (1986) 42 Cal.3d 284, 306.) There was no physical impossibility or apparent falsity with Cynthia's testimony. Furthermore, in denying appellant's motion for new trial based on this same argument, the court found Cynthia was a credible witness.

III. Priors

A. Background

The information alleged appellant suffered four prior convictions in Massachusetts; two for armed robbery and two for assault with a dangerous weapon. The prosecutor adduced two sets of documents from Massachusetts -- Exhibit 21, from the Massachusetts Department of Corrections, and Exhibit 23, from the clerk of the Plymouth County Superior Court. Exhibit 21 included certified documents prepared by the Massachusetts court, a fingerprint exemplar, copies of the indictments and docket entries for appellant's armed robbery convictions. Exhibits 24 and 25 were two documents listing the requirements of Massachusetts general law to demonstrate the elements of the Massachusetts offenses. A fingerprint expert testified that appellant's fingerprints matched those provided by the Massachusetts Department of Corrections. Over defense

objection the evidence was not a sufficient record of conviction, the court found the four priors to be true.

B. The Issue

Appellant contends the evidence was insufficient to prove he suffered three of the four prior serious felony convictions alleged in the information. Appellant argues that Exhibit 23 contained a record of conviction for only one prior (for armed robbery) and Exhibit 21 did not add to that record of conviction.

In *People v. Guerrero* (1988) 44 Cal.3d 343, the California Supreme Court addressed the permissible scope of proof to establish the substance of a prior conviction, i.e., the nature and circumstances of the underlying conviction. The court concluded the trier of fact could "look to the record of the conviction," but no further to establish the substance of the prior conviction. (*Id*., at p. 355.)

Subsequently, in *People v. Martinez* (2000) 22 Cal.4th 106, 116-118, the Supreme Court clarified that evidence other than the "record of conviction" and certified prison records, admissible under section 969b, were admissible to establish issues pertaining to a prior conviction as long as such evidence did not pertain to the substance of a prior conviction (e.g., such evidence was admissible to prove the fact of the prior conviction or the identity of the defendant as the person who suffered it).

The prison packet received from the Massachusetts Department of Corrections included documents certifying appellant's identity and the fact he served time for his convictions. Exhibits 24 and 25 listed the requirements of Massachusetts General Law chapter 265, sections 15A and 17 to demonstrate the elements of the offenses of which appellant was convicted.[5] Respondent notes the parameters for a "record of conviction"

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[5] On appeal, appellant does not challenge the court's finding the priors would have been serious felonies had they occurred in California.

have not yet been set, but it includes documents prepared by the trial court in connection with the conviction at issue. (*People v. Woodell* (1998) 17 Cal.4th 448, 454-457.) Abstracts of judgment are considered part of the "record of conviction." (*People v. Johnson* (1998) 208 Cal.App.3d 19, 25-26.)

Respondent urges that Exhibit 21 included the equivalent of abstracts of judgment which defined the terms of appellant's commitment and the nature of his conviction. The packet contains four documents, one for each prior, from the superior court commanding the sheriff to convey and deliver appellant to the Massachusetts Correctional Institution. The crime for which appellant was being committed was identified on each document, and Exhibits 24 and 25 defined those crimes. We agree the records from the Massachusetts Superior Court contained in the prison packet are equivalent to an abstract of judgment and should be considered part of the "record of conviction" and thus are adequate to prove the substance of the appellant's prior convictions.

IV. CALJIC No. 17.41.1

Appellant contends instructing the jury with CALJIC No. 17.41.1 denied him the right to juror unanimity, due process and a fair trial. In *People v. Engelman* (2002) 28 Cal.4th 436, although the court directed the instruction should not be given in the future (for some of the concerns expressed by appellant), it held the instruction did not infringe upon a defendant's federal or state constitutional rights.

As the instruction was given here just before *Engelman* was handed down and appellant objected to giving the instruction, we follow the approach adopted in *People v. Molina* (2000) 82 Cal.App.4th 1329, 1332-1335, assume arguendo the instruction should not have been given, and review the matter under the *Chapman* standard of harmless error. There is no indication the instruction had any effect on the deliberations or the verdict in this case. Thus, any error in giving the instruction was harmless beyond a reasonable doubt.

V. Multiple Punishment

Appellant was sentenced to concurrent sentences on counts III (assault with a firearm), V (criminal threats) and VII (first degree burglary). Appellant contends the one strike sentence for rape during a burglary and the separate sentences for burglary, assault with a firearm and criminal threats violated the prohibition against multiple punishment in section 654. "Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one." (*Neal v. State of California* (1960) 55 Cal.2d 11, 19.)

"If, however, the defendant had multiple or simultaneous objectives, independent of and not merely incidental to each other, the defendant may be punished for each violation committed in pursuit of each objective even though the violations share common acts or were parts of an otherwise indivisible course of conduct." (*People v. Cleveland* (2001) 87 Cal.App.4th 263, 267-268.)

"Whether the defendant entertained multiple criminal objectives is a factual question for the trial court, and its findings on this question will be upheld on appeal if there is any substantial evidence to sustain them." (*People v. Nubla* (1999) 74 Cal.App.4th 719, 730.)

Respondent concedes the sentence on count VII (first degree burglary) should have been stayed as the jury determined appellant burglarized Cynthia's house with the intent to commit rape, and it is established that when a defendant unlawfully enters a home for the sole purpose of sexually assaulting the victim, he may not be separately punished for both the burglary and the sexual crimes. (*In re Mc Grew* (1967) 66 Cal.2d 685, 688-689.)

As observed in *People v. Cleveland*, *supra*, 87 Cal.App.4th 263, 272, "'at some point the means to achieve an objective may become so extreme they can no longer be

termed "incidental" and must be considered to express a different and more sinister goal than mere successful completion of the original crime.'" Section 654 "'cannot, and should not, be stretched to cover gratuitous violence or other criminal acts far beyond those reasonably necessary to accomplish the original offense.'" (*Ibid*.)

The record contains substantial evidence to support the trial court's implicit finding appellant's intent and objective in assaulting Cynthia with a firearm and making criminal threats against her and her children was separate, rather than incidental to his intent and objective in committing the other offenses. (See *People v. Coleman* (1989) 48 Cal.3d 112, 162.) On the early morning of August 15, Cynthia awoke to find appellant standing over her with a knife. Appellant then forced Cynthia at knifepoint to leave her house and search her car for her gun; when the gun was not found, appellant and Cynthia returned to her house, to the bedroom. Appellant exchanged the knife for the gun when it slid out from under the pillow. Appellant chose to escalate the level of violence as he had already gained control over Cynthia through his use of the knife. Thus, the situation became more life-threatening, while adding nothing to appellant's ability to commit the other offenses.

In addition, when Cynthia awoke to find appellant standing over her, he threatened to cut Cynthia's throat and kill her children, who were asleep in another room. After appellant exchanged the knife for the gun, he threatened to kill both Cynthia and himself. Like the use of the gun rather than the knife, the threats were a gratuitous act escalating the level of danger and the potential for violence.

Accordingly, we will direct the superior court to stay the sentence on count VII only and to send a corrected abstract of judgment to the Department of Corrections.

VI. Cruel and Unusual Punishment

Appellant contends his sentence was grossly disproportionate to his crimes, i.e., he admits he is challenging the Legislative sentencing scheme as applied here. The United

States Supreme Court recently upheld California's Three Strikes Law against an Eighth Amendment challenge. (*Ewing v. California* (2003) ___U.S. ___, 123 S.Ct. 1179.) Appellant's sentence was not cruel and unusual as he was sentenced not just for his current offenses, but also for his recidivist behavior. (See our discussion in *People v. Kinsey* (1995) 40 Cal.App.4th 1621, 1630-1631.)

DISPOSITION

The matter is remanded to the superior court with directions to stay the sentence on count VII and to file a corrected abstract of judgment with the Department of Corrections reflecting that correction. In all respects, the judgment is affirmed.

WOODS, J.

We concur:

JOHNSON, Acting P.J.

ZELON, J.